No. 3422

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK H. SCHURMANN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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This appeal brings in review a decree setting aside and cancelling, under Par. 15 of the Act of June 29, 1906, 34 Stat. at L. 596, 601, Chap. 3592, as fraudulently and illegally procured, a certificate of citizenship theretofore issued to appellant herein by the Superior Court of Los Angeles County, State of California, on December 17, 1904.

History of the Case.

On August 27, 1918, the United States Attorney for the District and Territory of Hawaii filed in the United States District Court in and for the Terri-

tory of Hawaii, at the April Term, A. D., 1918, a bill in equity, wherein United States of America was named as plaintiff, and Frank H. Schurmann was named as defendant, praying for the cancellation of certificate of citizenship theretofore issued to said Frank H. Schurmann, and for general relief (see Transcript of Record, pp. 9 to 21); on October 25, 1918, the defendant, *in propria persona* (being unable to obtain the services of counsel—see Transcript of Record, p. 295) filed an appearance and a demurrer (which he denominated an answer—see Transcript of Record, pp. 21 to 23) which demurrer was presented by him and was by the court overruled (see Transcript of Record, pp. 249 to 253); that he, likewise *in propria persona,* filed an answer (see Transcript of Record, pp. 26 to 33); on October 28, 1918, the cause was set to be heard on October 31, but the hearing was actually commenced on October 29, 1918, the plaintiff appearing by S. C. Huber, United States District Attorney, and J. J. Banks, Deputy United States District Attorney, and the defendant appearing in person and without counsel (see Transcript of Record, pp. 222 to 227); after taking the testimony of several witnesses the cause was continued until January 6, 1919, on which date the further hearing was resumed, the defendant still being without counsel (see Transcript of Record, pp. 249 to 292). On January 7, 1919, C. H. McBride entered his appearance as attorney for defendant and made an oral motion for a continuance (see Transcript of Record, p. 7 and pp.

293 to 296), followed by a written motion for a continuance (see Transcript of Record, pp. 34 to 39), both motions, oral and written, for a continuance being denied, and also made an oral motion for leave to withdraw the defendant's answer (filed *in propria persona)* and file in lieu thereof, within one hour from that time, a new answer which motion was likewise denied (see Transcript of Record, pp. 297-298); testimony was introduced by both sides, argument heard and the cause submitted to the court for consideration; on the 15th day of January, 1919, written decree was entered in said cause, setting aside and cancelling the certificate of citizenship theretofore issued to the defendant (see Transcript of Record, pp. 198 to 200); on January 20, 1919, a written opinion was filed setting forth the reasons for the cancellation of said certificate of citizenship (see Transcript of Record, pp. 189 to 197); thereafter an appeal from said decree was duly perfected by defendant, and the said cause is now before this court upon said appeal.

Questions Involved.

The questions involved in this appeal, and the manner in which they are raised, are as follows:

First: Whether the motions for continuance, oral and written, made by defendant should or should not have been granted, said oral motion being raised as shown by Transcript of Record, pp. 293 to 296,

and said written motion being raised by motion in writing as shown by Transcript of Record, pp. 34 to 39;

Second: Whether or not said bill in equity is sufficient in form as constituting a bill in equity for the cancellation of certificate of citizenship, that is to say, whether the facts alleged in said bill, if true, are sufficient to authorize or justify the court in cancelling certificate of citizenship, this question being raised by demurrer of defendant interposed to said bill (see Transcript of Record, p. 22 and pp. 249 to 253);

Third: Whether the proof adduced in support of said bill in equity is or is not sufficient to authorize or justify the court in cancelling said certificate of citizenship, this question being raised by the transcript of testimony herein and the specifications of error hereinafter described.

Fourth: Whether it is competent to cancel and set aside a certificate of citizenship, duly and regularly issued in 1904, upon proof of subsequent conduct in 1916; in other words, whether a period of approximately 12 years is reasonable or unreasonable in which to apply a presumption of continued existence retroactively.

Fifth: Whether the "fraud" described in section 15 of the Uniform Naturalization Act, so-called, means fraud practiced at the time of taking the oath of allegiance and procuring the certificate of citizenship, or means fraud subsequently arising.

Specifications of Error are Relied Upon.

The errors relied upon by the appellant are specifically set forth in the assignment of errors herein (see Transcript of Record, pp. 208 to 213) and are as follows:

1. The court erred in entering a final decree against the defendant-appellant and in favor of the plaintiff-appellee in this suit.

2. The court erred in finding and holding in favor of the plaintiff-appellee and against the defendant-appellant, because said holding and finding was and is contrary to the evidence and the weight of the evidence, and because there was a failure to prove the material allegations of the petition for cancellation of citizenship certificate in this suit.

3. The court erred in making, rendering and entering the final decree in said suit upon the findings and records therein.

4. The court erred in rendering and making its decree in said suit because said decree was and is contrary to all the evidence adduced in this suit, the preponderance of the evidence and the weight of the evidence, and is contrary to law and justice and to the facts and circumstances as stated and shown in the pleadings and records in said suit.

5. The court erred in finding for the United States of America, plaintiff-appellee herein, and against Frank H. Schurmann, defendant-appellant herein.

6. The court erred in holding petition for cancellation of citizenship certificate in this suit sufficient.

7. The court erred in holding that the petition for cancellation of citizenship certificate, alleging in substance insincerity in professed renunciation of former allegiance in taking oath to procure such certificate, charges fraud authorizing cancellation.

8. The court erred in holding that publication of propaganda in the United States in favor of Germany prior to the entry of the United States into the war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

9. The court erred in holding that the desire to circulate propaganda in the United States in favor of Germany after the United States and Germany were at war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

10. The court erred in holding that renunciation of allegiance not made absolutely and in good faith is warranted by the subsequent recognition of such allegiance.

11. The court erred in overruling the demurrer of defendant-appellant to the effect that statements made by him in the year 1918 do not and cannot constitute a ground for cancelling citizenship procured in 1904.

12. The court erred in overruling the demurrer of defendant-appellant to the petition for cancellation of citizenship certificate, said demurrer being on the ground that the said petition was insufficient

in that the same did not and does not contain any charge or allegation of fraud, express or implied, existing at the time of the procurement of such citizenship certificate.

13. The court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, at the time he made the oath of allegiance described in the opinion and decree herein, falsely and fraudulenty made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government, and William II, German Emperor.

14. The court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, did not, at the time of taking and making the oath of allegiance described in this cause, in truth and in fact at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to the Imperial German Government, and William II, German Emperor, and in finding that said defendant-appellant did then and there fraudulently reserve and keep his allegiance and fidelity to the Imperial German Government and to William II, German Emperor, and did remain under and bound by it and to it.

15. The court erred in overruling defendant's oral motion for a continuance.

16. The court erred in overruling defendant's written motion for a continuance.

17. The court erred in refusing permission and motion of defendant-appellant to withdraw purported appearance and answer filed by said defendant-appellant and dated October 25, 1918, and to file in lieu thereof a new answer to be filed within one hour of the time of making such request.

18. The court erred in overruling the motion of defendant-appellant to strike all of the evidence in this suit of the witnesses Holliday, Beaseley, Ludwig, and Allen, said motion being based upon the grounds, among others: (1) that the bill in equity in this suit to cancel certificate of citizenship was based upon the affidavit of one Jeanette Ryan, nee Mrs. John Ryan, whereas said Jeanette Ryan, nee Mrs. John Ryan, was not called by the plaintiff-appellee as a witness in this suit; and (2) this being an action founded upon fraud, the circumstances of the fraud must have been first set forth in the petition in this suit to entitle proof thereof.

19. The court erred in admitting in evidence "Government's Exhibit B" over the objections of defendant-appellant as follows: that the book was written and printed before the United States went into the war with Germany and has no bearing on the case whatever; that defendant-appellant was given authority by Congress to issue said book, having been granted a copyright therefor.

("Government's Exhibit B", referred to in Assignment of Error No. 19, is too long to quote here in full, and, moreover this is deemed unnecessary.)

Argument.

The record shows (commencing see Transcript of Record, pp. 313 to 336); that the appellant in this case was born in Germany, leaving that country when about the age of twenty years and going to Australia, and thence to the United States, landing at the port of San Francisco, appellant assigning as his reason for changing his domicile that he had come in contact with people who had lived in the United States and had thereby become imbued with the American feeling of freedom as contradistinguished from the feeling in Germany, as, for instance, concerning conscription and other great restrictions in many ways, and that he has not at any time been in accord or sympathy with the ideas of Prussian autocracy (see Transcript of Record, pp. 314 to 315, 330 to 331); that from San Francisco appellant went to the City of Chicago and there entered the National Medical University, from whence he went to and attended Union College of Osteopathy at Cleveland, Ohio, returning thereafter to Chicago and attending the Northern Illinois College of Opthomology and Otology, and then became a Professor in the Chicago Golden Cross Eye, Ear and Nose Clinic; thence going to Los Angeles and occupying the chair of Optometry in the Pacific School of Osteopathy. That appellant was married for the first time in Australia, his wife being an Irish woman who bore him four children; that after her death appellant was again married, in the State of California, to an American

woman born in America, whose parents, of German descent, were also American, born in America (see Transcript of Record, pp. 316 to 317); that since appellant arrived in the United States he never at any time returned to Germany; that after the declaration of war by the United States of America on the Empire of Germany, appellant joined the Red Cross, and both he and his children bought Liberty Bonds, War Savings Stamps, and Thrift Stamps (see Transcript of Record, pp. 285, 287, 321 to 323); that he has eight children living; that two of his daughters were married to American Army officers from his house and with his sanction, and another daughter had married an American of Irish descent who offered his services to America but was rejected on account of his age (see Transcript of Record, pp. 321 to 322); that appellant himself tendered his services to the Red Cross of the United States, and that his fourteen year old son, an active Boy Scout for several years, encouraged by him, won a medal of merit and attained a second lieutenantship by doing hard work for the government in the reserve force and otherwise (see Transcript of Record, pp. 322 to 323).

Appellant was naturalized as an American citizen on December 17, 1904, in Los Angeles, and his certificate of citizenship was by the decree appealed from set aside and cancelled on the following grounds: that appellant was the author of a certain booklet published in the year 1916, entitled "The War as Seen Thru German Eyes" (Government's

Exhibit B, see Transcript of Record, pp. 44 to 187), and that in the years 1916-17-18, appellant made to several persons remarks claimed to be detrimental to the United States.

Not a word of complaint is made concerning any act of appellant prior to 1916, either at the time of his naturalization in 1904 or at any subsequent time, save only what is now claimed to have been his inward intent, or insincerity, in his renunciation of allegiance in 1904, and this is attempted to be proved solely and entirely by conduct in 1916 and later. It affirmatively appears that he has in the meantime led an exemplary life and conducted his profession and affairs in an honorable manner. He has twice married, has children by both wives, and is properly educating them and bringing them up as loyal American citizens.

The booklet published in 1916 may at once be dismissed from consideration, for, though it contains expressions with which most of us are not in accord, it must be viewed from the standpoint of the time when it was published, when every citizen had the right to freely speak, write and publish his opinions as to the cause of the European war and the justice or injustice of the European nations engaged therein. Such parts of it as comment on the attitude of our government constitute, at most, criticism of acts of public officials, which he, like every other citizen, had the absolute right to freely speak, write and publish.

The only other evidence against him is the testimony as to oral declarations alleged to have been subsequently made by him, which are claimed to indicate disloyalty. These constitute for the most part nothing more than expressions of opinion as to the probabilities of success of one or the other of the belligerents. He positively denies having made the statements attributed to him. In addition to giving due consideration to the well known rule that testimony as to oral statements are to be received with caution, we must bear in mind the fact that appellant's joining the Red Cross, purchasing Liberty Bonds and War Savings and Thrift Stamps, that none of his children speak German, that two of his daughters, with his sanction, married American Army officers, and that his fourteen year old son, encouraged by him, won a medal of merit and attained a second lieutenantship in Boy Scout and reserve force work bespeak for him a loyalty far greater than can be overcome by dubious testimony of alleged oral statements. Stating this more tersley, facts speak louder than words.

It would solve no useful purpose to unduly lengthen this brief with a discussion of the testimony. This is, therefore, left for the calm consideration of the court, and we will ask the court, in weighing the probabilities, to give due consideration to the differences of opinion and the unsettled conditions existing at the time the remarks are alleged to have been made.

The Law.

Discussion of the law side of this appeal almost necessarily requires the concession (of course for the purpose of argument only) that the testimony as to the alleged oral statements of appellant is true. This discussion easily, and it may be said automatically, divides itself into three main portions:

1. Whether the bill in this case, charging fraud in general terms, is sufficient;

2. Whether the fraud contemplated by section 15 of the Naturalization Act, in its provision for the cancellation of certificates of naturalization procured by fraud, means fraud practiced at the time and in or for the act of procuring the certificate of citizenship, or means fraud committed many years later.

3. Whether fraud at the time can be presumed solely from acts committed many years later, or stating the proposition more closely as related to the facts of this case, whether proof that a naturalized citizen gives vent, in 1916, to expressions of sympathy for the country of his birth relates retroactively so as of itself to create a presumption that he committed fraud in obtaining his certificate of naturalization in 1904, twelve years previously, or, putting the question more tersely, whether a presumption of continued existence, even if it could be said that one rises out of such subsequent conduct, runs backward.

NATURALIZATION IS A FINAL JUDGMENT.

In considering these propositions we must always bear in mind the fact that proceedings for naturalization are conducted in Courts of Record, and that the decree of naturalization is in effect a judgment of like dignity and bearing like finality and conclusiveness as any other judgment of a court of record having jurisdiction.

Spratt v. Spratt, 4 Peters, 393;
Stark v. Chesapeake I. Co., 7 Cranch 420;
U. S. v. Aakervik, 180 Fed. 137;
Ex p. Cregg, 6 Fed. Cas. 796, Fed. Case 3380;
In re McCoppin, 15 Fed. Cas. 1300, Fed. Case 8713;
Dolan v. U. S., 133 Fed. 440, 449.

It has also been uniformly held that a judgment will not be set aside for perjury or misrepresentation in its procurement.

U. S. v. Throckmorton, 98 U. S. 61;
U. S. v. Gleason, 90 Fed. 778;
Tinn v. U. S. Dist. Atty., 148 Cal. 773;
Hanley v. Hanley, 114 Cal. 690.

In this last case it was held that a decree allotting a homestead to the widow will not be set aside on the ground that she falsely represented to the court that it was community property and that she was living with her husband at the time of his death, and this, notwithstanding that appellants had no notice of the proceedings to set aside the homestead and that they were practically *ex parte.*

The basis of this doctrine, as is well known, is that there must be some finality to litigation, and therefore the court will not retry an issue that has once been tried and become final. The exception to this rule is where the judgment has been procured by some fraud extrinsic or collateral to the issue that was adjudicated; as, for instance, where a party by fictitious negotiations for compromise or false statements of the day set for hearing was prevented from defending and there was thus, by means of the fraud, created a position in which there was practically no adversary.

U. S. v. Throckmorton, supra.

We are not unmindful of the fact that this rule has been somewhat modified by section 15 of the naturalization act, providing that naturalization procured illegally or by fraud may be canceled by means of suit in equity brought by the District Attorney.

Oehlert v. Oehlert (Mass.), 124 N. E. 249;
Johannessen v. U. S., 225 U. S. 227.

But, as shown by this latter case, when the decree of naturalization is attacked for fraud, such fraud must be committed in the very act of procuring the naturalization, and the court must have been imposed upon as to a direct essential question of fact. This latter case was heard on demurrer to the amended petition, which demurrer was overruled. No answer was filed, and decree canceling citizenship followed, from which the respondent ap-

pealed. The amended petition alleged that the decree of naturalization had been procured by fraud, in this, that, although the petition for naturalization was filed less than four years after respondent's first arrival in this country, he and his witnesses falsely testified that respondent had resided more than five years in the United States, which falsity was not discovered by the United States until eight years later, when respondent voluntarily made an affidavit wherein he admitted that the certificate of naturalization had been illegally procured in that he had not been a resident of this country for the requisite five years. That case is a good example of the cases this enactment was intended to reach. Here was a person who, not having resided here the requisite five years, was wholly ineligible for citizenship, and who yet, by fraud and perjury, procured a decree of naturalization. And this was accomplished by the false statement of a physical fact, and, moreover, such perjury and falsity were brazenly admitted, both by respondent's own affidavit and by his failure to answer the petition upon the overruling of his demurrer. Such a situation is wholly unlike the case at bar, where there is no charge whatever as to any fraud in the proceedings or misrepresentation as to any matter of fact, where there is nothing more than a bare averment as to appellant's inward intention in 1904 in taking the oath of allegiance, and this inward intention is attempted to be proven solely by conduct twelve to fourteen years later.

THERE IS NO FRAUD CHARGED IN THE BILL.

The bill alleges in substance as follows: That appellant is a resident of Honolulu, Hawaii; prior to December 17, 1904, he was a subject of the Imperial German Government, and of William II, German Emperor; that on December 17, 1904, in the State of California, County of Los Angeles, appellant became a citizen of the United States by naturalization, a certificate of citizenship being issued and delivered to him (see Transcript of Record, pp. 9 to 13); prior thereto the affidavit referred to in the Naturalization Act was duly signed and sworn to, etc.; that appellant made the oath by law required to obtain the citizenship certificate, and that said certificate of citizenship was procured by fraud, in that at the time that appellant took the oath of allegiance he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever etc., and that in fact he did not absolutely renounce and abjure all or any allegiance and fidelity, but did then and there fraudulently reserve and keep in whole or in part his allegiance and fidelity to the Imperial German Government and to William II, German Emperor. It is observable that the bill in equity contains allegations which are general in character and that no specific acts constituting fraud are set up or alleged.

> "Facts must be shown by the bill from which the court may judge whether the decree was

fraudulently obtained and the court imposed upon."

U. S. v. Norsch, 42 Fed. 417.

The insufficiency of the petition in the case at bar is well illustrated by the case of

U. S. v. Rockteschell, 208 Fed. 530.

That case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The lower court had sustained a demurrer to the petition for cancellation of citizenship and dismissed the petition. The Government appealed. The petition alleged:

> "That the said order and certificate of citizenship was procured from said court upon the representation that said respondent had resided within the United States for the continued term of at least five years * * * whereas in truth and in fact respondent had not resided continuously in the United States for five years * * * but had resided in the United States at the times and in the manner as set forth in the affidavit annexed to this petition."

The affidavit showed physical presence in the United States for three years and absence for the greater part of the time later, he having been here only at infrequent intervals in the last two years. The court in its opinion holding the petition insufficient, says:

> "But this general averment, involving, as it does, possible inferences of law as well as general conclusions of fact, is insufficient as a charge of perjured testimony or other fact.

> The controlling question is whether respondent misrepresented or wilfully withheld from the court any of the concrete, probative facts. * * * To be sufficient, the pleading must, in harmony with the general rule of pleading, fraud, point out specifically in what particular the representations were false. This the petition failed to do."

See also

20 Cyc. 96;

9 Encyc. of Pl. & Pr. 686.

The rule respecting the essentials in pleading fraud and the doctrine that the precise, even somewhat evidentiary facts showing the fraud must be definitely pleaded are so well established that it would be idle to cite more authorities to sustain a proposition which is really elementary. It thus abundantly appears that the bill is insufficient, and the demurrer thereto should have been sustained.

THERE IS NO EVIDENCE OF ANY FRAUD COMMITTED IN OR PRIOR TO THE YEAR 1904. THEREFORE THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE DECREE.

Section 15 of the Naturalization Act, providing for the cancellation of certificates of naturalization procured illegally or by fraud, contains no provision for the cancellation of such certificates by reason of acts subsequently committed, nor does it contain any provision whatever creating any presumptions from subsequent conduct, with the sole exception of the taking up, by a naturalized citizen, of a perma-

nent residence in a foreign country within five years after naturalization, which latter provision is considered at length in

Luria v. United States, 231 U. S. 9,

which case we will discuss presently The act is not punitive in character, and makes no attempt to deprive a naturalized citizen of his citizenship by reason of subsequent conduct. The act simply provides that a certificate of citizenship procured illegally or by fraud may be cancelled. This, as already demonstrated, means fraud committed at or prior to the time of naturalization and in the very act of procuring the certificate. Just like any other question of fact in issue,

SUCH FRAUD MUST BE PROVEN BY COMPETENT TESTIMONY ACCORDING TO THE ESTABLISHED RULES OF EVIDENCE.

No such evidence has been presented in the case at bar. The District Attorney has not presented an iota of evidence as to any fact whatever prior to 1916 except the issuance of the certificate of citizenship in 1904, which, of course, bears with it the attendant presumptions of validity. No attempt whatever has been made to prove the fraud alleged to have been committed in 1904, except only by utterances, claimed to be disloyal, alleged to have been made in 1916 and later. It must already be obvious to this court that there is no evidence in the record sufficient to sustain the decree.

But it attempted to sustain the decree by the novel theory that appellant's intent in 1904, when

he procured his certificate of citizenship, may be shown by evidence of his conduct twelve years later, or, stating the proposition in another form, that the existence of a thing today proves its existence twelve years ago. This, it will be noticed, is a complete reversal of the doctrine that a thing proven to exist continues to exist as long as is usual with things of that nature, which is a presumption of future continued existence. But here we have an attempt to make a presumption of continued existence run backward. And we must not for a moment lose sight of the fact that no such presumption is created or attempted to be created by the act. On the contrary, such backward or reverse presumption is attempted to be created solely by judicial decision, without any authority whatever to support it, save only a decision of a *nisi prius* court of co-ordinate jurisdiction, in the case of United States v. Wursterbarth, 249 Fed. 908, to which we shall presently give our attention. We are not unmindful of the case of United States v. Darmer, 249 Fed. 989, also by a *nisi prius* court, cited by the learned judge in his opinion, but this case, as we will presently show, states a rule of pleading, and not of evidence.

With but these two cases as authority it is attempted to overturn the long established rules of evidence and, through a complete reversal of established doctrines, to prove the existence, in 1904, of a state of mind by proof of conduct twelve or more years later, under far different circumstances.

And the District Attorney will no doubt term this due process of law.

If authority were needed to refute such an astounding proposition, it can be furnished in abundance. In

Ellis v. State, 138 Wis. 513,

arising by virtue of a writ of error to the Circuit Court to review a conviction of the offense of receiving money into a bank for the credit of a depositor with knowledge or good reason to know (a state of mind, as in the case at bar) that the bank was unsafe or insolvent, Justice Marshall, rendering the decision, says:

> "It is an elemental principle of evidence that as a general rule presumptions do not run backward; that while 'when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person [personal] relation or state of things continues to exist as before until the contrary is shown or until a different presumption is raised from the nature of the subject in question' (State *ex rel.* Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Greenl. on Evidence, § 41) *there is no retroactive evidentiary inference, especially reaching backward materially.* So, proof of insanity or insolvency at a particular time is not competent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto." (Italics ours.)

With what greater force this principle is applicable to a state of mind, thought or sympathy needs nothing more than to be suggested.

Similar doctrine is enunciated in

1 Greenleaf on Evidence, section 41.

That the existence of this doctrine is recognized by the Congress is demonstrated by the provision, in the second paragraph of section 15 of the Naturalization Act, providing that the taking up, within five years after naturalization, of a permanent residence in a foreign country is presumptive evidence of an absence of intention at the time of naturalization to reside in the United States. This provision creates a statutory presumption, so created by positive, statutory enactment. It will scarcely be contended that, in the absence of any such statutory provision, absence of intent at the time of naturalization to reside in the United States could under the existing rules of evidence be presumed from subsequent departure. If such were the case, there would have been no necessity for this express legislation. Let us not forget that there is no such provision in any way applicable to the case at bar. The above provision, as already suggested, is discussed in the Luria case, supra.

In that case it appears that the appellant obtained his certificate of citizenship in July, 1894. *In the following month* he sought and obtained a passport to go to South Africa, and in the following November he left the United States for Transvaal. From that time to the date of the hearing, in December, 1910, he resided and practiced his profession in South Africa, joined the South African Medical Association and served in the Boer war, and in a short

visit to this country he gave his address as Johannesburg, South Africa. He was not present at the hearing, and, although there was ample time to take his deposition, it was not taken, and there was no attempt to explain his removal to the Transvaal so soon after he procured his certificate of citizenship. The validity of the statute creating the presumption of lack of intention to reside permanently in the United States was drawn in question. In its discussion the court, upholding the reasonableness of an enactment creating a presumption of lack of intent to permanently reside in the United States from the fact of taking up a permanent residence in a foreign country *shortly* following naturalization, says (p. 27):

> "No doubt the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years, without rendering the presumption baseless. *That period seems long* and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress." (Italics ours.)

That case discloses a presumption of evidence established by legislative enactment as a part of the substantive law of the land; in the case at bar we have a case where a presumption of evidence is laid down by a trial court without statutory authority; in the Luria case, the period established by law is five years; in the case at bar, we have a court holding a judicial presumption of evidence retroactive to the extent of twelve years; in the Luria case, notwithstanding the fact that Congress established a presumption as a part of substantive law,—notwithstanding that the presumption arises by virtue of the will of the people expressed through their accredited representatives,—yet the highest and most supreme tribunal of justice in the United States (and perhaps in the whole world) indicated that the period established—five years—is unreasonable; in the case at bar, the trial judge decides as a judicially created rule of evidence that a period of twelve years is not unreasonable; in the Luria case, there was an absolute unequivocal act; in the case at bar there was none; in the Luria case, the alien receiving the certificate of citizenship was expressly forbidden by law, under penalty of loss of citizenship, from departing from the United States within the designated period; in the case at bar there was no such inhibition. Notwithstanding that by the direct enactment of statute the Congress has created a presumption of absence of intent to reside in the United States arising from departure within five years, yet the Supreme Court holds that as the in-

tervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. What, then, must become of such a presumption *after* the lapse of five years, even when enacted by statute? And how, in the face of this decision, can it possibly be claimed that such a presumption can at all exist under the established rules of evidence, without such statutory enactment, and especially after the lapse of twelve years?

CASES CONTRA.

The learned trial judge, in his opinion (Transcript pp. 189-197) cites the case of United States v. Wursterbarth, *supra,* which, as above stated, is a decision by a *nisi prius* court, and in which the court itself, in its opinion, says that

> "the case is one of first impression, as far as I am informed or have been able to ascertain".

There it appears that the respondent upon being requested to contribute to the Red Cross, became angry and said that he would do nothing to injure the country in which he had been born, brought up and educated, would give no money to send soldiers to the country where he was born and educated and that the solicitor did not know what it meant to be born in a country and then have men go over and fight against that country; said further that he would do nothing to help defeat Germany and did not want

America to win the war, that he had relatives in Germany, *and that he only came to this country on a vacation or visit.* It further appears that the respondent *did not attempt to refute or explain any of that testimony.* The court there pertinently says:

> "If the respondent's present state of mind was different from what it was when naturalized, or if the expressions which he used did not properly express his feeling, an opportunity was afforded him to have so demonstrated. He did not attempt to explain or deny; his attitude was rather one of defiance. * * * The burden should be cast on the respondent to dispel the doubt. He, as no one else, has the means of doing so."

Concerning the presumption, the court says (p. 910):

> "It is argued that it is not legitimate to presume that his (respondent's) mental attitude today is the same as it was thirty-five years ago, and as a general rule presumptions do not 'run backwards'. I will readily concede that proposition."

Yet the court, after practically conceding that the decision ought to be in favor of the respondent, proceeds to decide the other way. No appeal was taken, hence there was no opportunity for review by an appellate court. The decision was no doubt influenced by the respondent's own defiance and his wilful failure to deny or explain the statements attributed to him, or even to explain his former state of mind or intention. How different is the present case, where the defendant not only denied

the statements attributed to him, but testified (Tr. p. 287):

> "When I made said oath [on obtaining certificate of naturalization] I meant every word and syllable of it, and do so now, and I have shown by my acts and actions that I have always meant every word and syllable of that oath * * * Having renounced fidelity to Germany and sworn allegiance to America I was ready to aid in every respect, and I am ready now, if it comes to the test, to go and help honestly in every respect." Similar expressions on p. 288.

And how different is the present case, where defendant did subscribe, not only to the Red Cross, but also to Liberty Bonds and War Savings Stamps, urged his children to uphold and work for the flag, encouraged his son in Boy Scout and Reserve Force work, and where his children do not even speak a word of German, his family, home and household being thoroughly American.

The other case cited by the trial court, United States v. Darmer, *supra,* was, as above suggested, a decision on pleading, rendered on motion to dismiss, also by the trial court. The petition, after pleading the oath of allegiance and the fraudulent mental reservation, proceeds with allegations, somewhat evidentiary in their nature, but nevertheless necessary in pleading fraud to sustain this ultimate allegation, of respondent's refusal to buy Liberty Bonds because, as he said, it would be like kicking his own mother, and that he would rather throw all his property into the bay than buy one $50 Lib-

erty Bond. This petition is an illustration of what the petition in the case at bar should have contained. The court pertinently says:

> "Whether the feeling expressed existed in a stronger or weaker state, or at all, in 1888, cannot be determined merely from the allegations of the complaint. *Evidence alone can establish that.*" (Italics ours.)

Which latter expression makes this really a decision in our favor, for it plainly means that, in order to prove the alleged mental reservation pleaded, evidence must be produced showing that the feeling did exist, in a stronger or weaker state, or at all, at the time of naturalization.

It will be claimed, and it may be conceded, that the title to citizenship does not confer a vested property right but is a mere privilege capable of being revoked by the power that granted it. Still it must not be forgotten that this power of revocation is lodged in the people acting through their representatives in Congress, who as such representatives by legislative enactment have prescribed the definite and specific grounds for such revocation and the manner in which such grounds must be proven, that such power of revocation is not a matter of discretion lodged in any court, but may be exercised only through a solemn judicial proceeding after due proof, in a tribunal of justice according to due forms of law, of a ground for revocation thus specified by legislative enactment; that the law gains its respect only from a calm, just and impartial admin-

istration thereof, and, moreover, that trial judges should proceed with extreme caution in any attempt to establish new and hitherto unknown rules of evidence to fit a particular case, contrary to principles of substantive law which have been in existence for centuries, formulated into their present state af perfection through long years of experience. *"Fiat Justitia, Ruat Coelum."*

CONCLUSION.

The principle that presumptions of continued existence do not run backwards, so to speak, is so thoroughly established and interwoven into the fabric of our jurisprudence, that it would seem an insult to the intelligence of the judges of the court hearing this appeal to multiply authorities. In conclusion, therefore, it is respectfully submitted that the decree appealed from ought to be reversed and the petition ordered to be dismissed.

Respectfully submitted,

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